IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO. 5422 OF 2005
IN
FIRST APPEAL NO. 981 OF 2003

Hemchand H. Khandelwal ..Applicant
(Ori.Respondent)

versus

Smt. Rajpatibai B. Jaiswal & Anr. ..Respondents
(Ori. Appellants)

Mr. Rajesh Shah i/b. M/s. Arvind Rathod & Co. for the Respondents / Original Appellants.

Mr. Bharat Joshi for the Applicant / Ori. Respondent.

CORAM : D. G. DESHPANDE, J.

DATE : 4TH MAY, 2006

P.C. (IN CHAMBER) :

1. Heard Advocate for the Applicant - Respondent, who has filed this application for setting side an order, which according to him, is an exparte order passed by me on 24.3.2005, and also heard Advocate for the Appellants.

2. Firstly, this application is strongly opposed on the ground that the contention of the applicant - respondent about absence of his Advocate, is totally wrong. The matter was on board

right from 11.3.2005. Name of the Advocate was shown on board. The Advocate for the applicant - respondent was absent, and, therefore the matter was heard. The cause given by the applicant - respondent for his absence on particular day is that his clerk did not read or could not find the case on the printed board. In the counter affidavit filed by the appellants it has been positively asserted and stated that on the printed board, as well as, on the internet the matter was shown and the name of the Advocate was there. Therefore, it is clear that the contention of the applicant - respondent who is absent, is false. The present application is supported by the record of this office and the explanation given is not at all satisfactory.

3. Secondly, even on merits it was tried to be contended by the advocate for the applicant - respondent that paragraph 5 of the order contains some wrong statement of facts. Paragraph 5 is reproduced hereunder:

> **"My attention was drawn by counsel for the appellants to the roznama of the trial court dated 20.6.1997 as per which the respondent**

took out a Notice of Motion No. 2178 of 1997 for deleting issue and for alteration of issue. At that time only one issue whether the respondent was entitled to permanent injunction was framed. But the Respondent wanted in view of the suit filed by the present appellants in the High court to get the issue decided by the City Civil Court and therefore he took out Notice of Motion for addition or alteration of issue. That was partly allowed by the court on 20.6.1997 and then issue Nos. 1 to 3 were newly added."

Two statements, according to the applicant - respondent, are contrary to record. They are **"At that time only one issue whether the respondent was entitled to permanent injunction was framed."** My attention was drawn to page 65 of the appeal. They are issues in Suit No. 5113 of 1980 and there are in all seven issues. This is a fact on record and admitted by the counsel for the applicant / respondent that after the issues were framed, he has taken out a notice of motion for deleting unnecessary and irrelevant issues. Even he states

that he was present when only one issue was framed. If that is so, then the aforesaid statement in paragraph 5 of my order, is not, at all wrong or contrary to record.

4. In the said paragraph 5 of my order, it is stated by me **"That was partly allowed by the court on 20.6.1997 and then issue Nos. 1 to 3 were newly added"**. Even this statement according to the applicant / respondent is wrong and contrary to record. However, perusal of the order of the trial court in this regard, which is filed along with this application, clearly shows that even in paragraph 3 the trial court came to the conclusion **"In these circumstances, issue Nos. 2 and 3 are necessary issues to determine the lawful possession of the Plaintiff as well as the nature of the possession",** and then the court recasted issue No.1.

5. Therefore no observations in my order dated 24.3.2005 are wrong and contrary to record. There is no merit in this Application, the same is rejected.

(D.G. DESHPANDE, J.)